

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 June 2007

Case No.: **2007-LHC-00270**

OWCP No.: **5-120500**

In the Matter of:

W. E. C.,

Claimant,

v.

**NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,**

Employer (Self-Insured),

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**

Party In Interest.

DECISION AND ORDER

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Newport News, Virginia, on March 14, 2007 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS¹

The Claimant and the Employer have stipulated to the following:

¹ The following abbreviations will be used as citations to the record:

JS	-	Joint Stipulations;
TR	-	Transcript of the Hearing;
CX	-	Claimant's Exhibits; and
EX	-	Employer's Exhibits.

1. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;
2. An Employer/Employee relationship existed at all relevant times;
3. That the claimant sustained right carpal tunnel syndrome resulting from his employment with a date of diagnosis on August 7, 2003;
4. That a timely notice of injury was given by the employee to the employer;
5. That a timely claim for compensation was filed by the employee;
6. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversy;
7. That the claimant's average weekly wage at the time of his diagnosis was one thousand one hundred and sixty four dollars and forty four (\$1,164.44) resulting in the compensation rate of seven hundred and seventy six dollars and twenty nine cents (\$776.29);
8. That the Employer has paid benefits to the claimant as documented on the enclosed LS-208 dated October 5, 2006;
9. That Dr. Gwathmey examined the claimant at the request of the Office of Workers' Compensation Programs;
10. That Dr. David Antonio is the claimant's treating physician for this injury.

ISSUE

What is the appropriate schedular rating for this impairment?

COMPENSATION FOR DISABILITY

Sec. 8 of the Act provides that Compensation for disability shall be paid to the employee as follows:

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision(e) of this section respectively and shall be paid to the employee as follows:

- (1) Arm lost, three hundred and twelve weeks' compensation.
- (3) Hand lost, two hundred and forty-four weeks' compensation.

- (6) Thumb lost, seventy-five weeks' compensation.

CONTENTIONS

The Claimant states that

The Employer initially accepted the 15% disability rating for the right upper extremity based on the opinion of Dr. Frank Gwathmey, the independent physician hired by the Department of Labor to examine Claimant, as well as the opinion of the OWCP. One day later, the Employer rescinded that offer and paid Claimant based on a 15% disability rating of the hand per the opinion of Dr. David Antonio, Claimant's treating physician. Claimant now seeks benefits based on the 18% disability rating of the right upper extremity based on the opinion of Dr. Gwathmey that included Claimant's thumb impairment.

It has been held by the Benefits Review Board that an injury to the wrist should result in an impairment rating to the upper extremity. See Sankey v. Sun Shipbuilding and Dry Dock Company, 14 BRBS 272 (1981) and Hunigman v. Sun Shipbuilding and Dry Dock Co., 8 BRBS 141(1978); Brown v. National Steel & Shipping Co., 34 BRBS 195 (2001) (found that injury to claimant's wrists may be compensated as permanent partial disability to his arms under Section 8(c) (1) of the Act if there is evidence in the record which supports a finding of impairment to the arms). Further, the American Medical Association considers an injury to the wrist to be an impairment of the upper extremity in the Guides to the Evaluation of Permanent Impairment. In that treatise the pages which deal with impairment for carpal tunnel syndrome only reference the upper extremity. Those pages never refer to a hand impairment. (AMA Guides 466-468).

Dr. Antonio and the Employer rely on the Manual of the American Academy of Orthopaedic Surgeons to prove that Claimant should only receive an impairment rating for his hand instead of his entire upper extremity. However, the only thing that is known about this manual is that it has been out of production for almost twenty (20) years. (CX 8-1). Dr. Antonio was not able to find which edition he was using nor the date of printing. (EX 2-11).

The opinion of Dr Gwathmey should be accepted for several reasons. Dr Gwathmey is an independent physician chosen by the OWCP and he is a hand specialist.

It is argued that the claimant

suffered a work-related wrist injury while employed by Newport News Shipbuilding and that he is entitled to permanent partial disability benefits for an 18% impairment of the right upper extremity resulting in 56.16 weeks of

compensation at a rate of \$776.29 for a total of \$43,596.45 and medical treatment associated with this injury. Employer is entitled to a credit for the compensation already paid for the 15% impairment for the right hand.

Employer's counsel states that at the hearing, the claimant reported

That he had the onset of Right hand numbness and pain and sought treatment from Dr. David Antonio. Dr. Antonio diagnosed the Claimant as suffering from carpal tunnel syndrome and performed a carpal tunnel release on March 9, 2005. He also removed a ganglion cyst at the time of the surgery.

Dr. Antonio testified in his deposition that the Claimant made a slow but steady recovery from his surgery. He last saw the Claimant on September 11, 2006 at which time he felt that the Claimant was doing reasonably well.

Dr. Antonio also assigned an impairment rating of 12% to the Right Upper Extremity per letter to Greg Camden. EX 1-2. In his deposition Dr. Antonio indicated his opinion that he believes the appropriate rating to be given based on his physical examination of the Claimant would be 15% of the Right hand. Dr. Antonio indicated that his rating is based upon the Manual of the American Academy of Orthopaedic Surgeons. Dr. Antonio explained that the Manual of American Orthopaedic Surgeons is similar to the AMA Guidelines but deals only with orthopedic problems. Depo page 8. He noted that the AMA Guidelines and the Manual essentially work out to about the same rating. Depo page 8.

Upon rigorous cross examination by Claimant's Counsel, Dr. Antonio explained that 15% impairment of the hand would be equivalent to a 12% impairment of the upper extremity.

The Employer believes that Dr. Antonio's impairment rating of 12% of the upper extremity is appropriate and should be awarded to the Claimant. Dr. Antonio specifically noted that he based his impairment on the Claimant's actual physical deficit following surgery. Dr. Antonio has treated the Claimant in the past and for this injury. Indeed the Claimant noted that he was satisfied with Dr. Antonio's treatment and his recovery.

There is no requirement that a physician utilize the AMA Guidelines in formulating a rating nor is there any requirement that the OALJ disregard any opinion that does not rely upon the AMA guidelines. Indeed the Board has indicated that "the Act does not require adherence to any particular guide or formula," nor is the ALJ bound to utilize the AMA guidelines. Mazze v. Frank K. Holleran, 9 BRBS 1053 (1978).

Dr. Antonio fully explained his opinion in his deposition. He explained that his opinion is based upon the physical deficits he found upon examination

of the claimant, primarily loss of grip strength. Further, he explained that there was no loss of function in the Claimant's right wrist, notwithstanding the surgery for Carpal Tunnel Syndrome.

Evaluation of the Evidence

At the hearing, the Claimant testified that when he used vibratory tools he had pain that ran from the wrist up the arm. (TR 13). Problems began after using such a tool for about thirty minutes. He could only bring the thumb to about two inches from his palm. Dr. Antonio had performed the carpal tunnel surgery as well as a procedure on the low back.

During surgery on March 9, 2005, Dr. Antonio, an orthopedic surgeon, performed a right carpal tunnel release and removed a ganglion cyst from the dorsal aspect of the wrist. The physician evaluated the Claimant in June and in mid-September of 2005.

Evaluation during the later visit showed that the Claimant

Is somewhat tender over both incisional areas. There is slight stiffness of his MCP joints compared to the left. Grip strength on the right is slightly restricted. Grip strength measures on the monitor shows he has a 40% reduction grip strength right hand compared to the left. I would rate his permanent physical impairment at 15% of hand function which equates to 90% (sic) of whole person impairment. I am going to suggest he continue activity and work as tolerated and I will see him for followup in a year unless he has any significant problems prior to that time.
(CX 7).

Dr. Antonio has stated that the Claimant's permanent physical impairment is 12% of upper extremity function. (CX 7).

When deposed in February 2007, Dr. Antonio testified that the Claimant had a 15% impairment of hand function which equated to a 9% impairment of whole body function. These ratings were based on the Manual of the Academy of Orthopedic Surgeons. The manual would assign a rating of 12% for the upper extremity loss. (EX 2, See EX 3).

Dr. Gwathmey examined the Claimant in September 2006.

On examination today, he has full range of motion of his wrist and fingers. He complains of pain in the incision area and at the proximal wrist crease. Grip strength is only 45-50 pounds on that side compared to 80-85 pounds on the opposite side. He is right handed.

In addition, he has significant osteoarthritis involving the thumb MP joint and IP joint, which has been increasing over several years. He has been working for the shipyard for 26 years.

In terms of an actual impairment rating, I would not have any problem with the rating that Dr. Antonio gave him of 15 percent of that hand, and this can be derived from both grip strength and residuals of his carpal tunnel, but the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition would prescribe a 15 percent impairment of the upper extremity. I do not know whether you wanted the contribution of the thumb or whether we were strictly talking about the carpal tunnel syndrome and the ganglion.

In any event, if the thumb is part of the disability impairment which you are looking for that would have an additional 3 percent of the upper extremity, again based on the AMA Guidelines, Table 16-18, Chapter 16.7.

The 90 percent impairment that is in the chart of Dr. Antonio would appear to be a typographical error and probably was meant to represent 9 percent not 90. If one looked at the AMA Guidelines Extrapolation Tables, 15 percent of hand function actually equals 8 percent of the whole person, but if one looked at 15 percent of the upper extremity, it would equal 9 percent, so I think that is where that number comes from. The 12 percent, I have no idea where that comes from. In any event, I believe that 15 percent is a reasonable rating for the upper extremity and 18 percent if one includes the thumb. (CX 4).

Discussion

The undersigned acknowledges that he is not bound by the criteria in the AMA Guide or by any other medical treatise. However, the AMA Guide is widely accepted and the status of the other mentioned text is uncertain.

Dr. Antonio is the treating physician but he is an orthopedic surgeon who does not specialize on any particular part of the body. Dr. Gwathmey is a specialist in hand surgery.

The undersigned defers to the expertise of Dr. Gwathmey and accepts his rating based on a recognized medical treatise.

ORDER

1. The Employer is to pay the Claimant an 18% schedular rating for the right upper extremity pursuant to Section 8(c) (1) of the Act.
2. Medical treatment continues to be authorized for this impairment.
3. Employer shall receive credit for all compensation that has been paid.
4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

5. The Claimant's attorney shall within 20 days of the receipt of this order, submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

A

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia